

IT 00-12

Tax Type: Income Tax

**Issue: Withholding Tax – Failure to File Return/Make Payment
Bearing the Burden for Payment of Tax (Claim Issues)**

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

“CALL THE BALL, INC.”,

Taxpayer

**NO. 99-IT-0000
FEIN: 00-0000000
TAX YR. ENDING: 12/31/95**

**Kenneth Galvin
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Ms. “Mary Kay Place”, General Partner, on behalf of “Call The Ball, Inc.”,
Mr. Ralph Bassett, on behalf of the Illinois Department of Revenue,

SYNOPSIS:

This matter comes on for hearing pursuant to “Call The Ball, Inc.’s” (hereinafter “taxpayer”) timely protest of the Notice of Deficiency (“NOD”) issued on June 9, 1999, proposing an assessment of withholding tax, penalty and interest for the fourth quarter of 1995. The Illinois Department of Revenue (hereinafter the “Department”) maintains that the taxpayer withheld Illinois income tax from the compensation paid to its employees but did not pay such monies over to the Department or file a withholding tax return as required under Section 704 and 705 of the Illinois Income Tax Act. A hearing was held on this matter on June 28, 2000, with “Mary Kay Place”, General Partner of “Call The Ball, Inc.”, and “Martha Jane Stewart” testifying for the

taxpayer. Following the submission of all evidence and a review of the record, it is recommended that the NOD be cancelled.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the NOD issued on June 9, 1999, showing a total liability for withholding tax due and owing for "Call The Ball, Inc." in the amount of \$1,150.00 plus penalties and interest for the fourth quarter of 1995. Tr. p. 5; Dept. Ex. No. 1.
2. On June 25, 1999, "Mary Kay Place", General Partner of "Call the Ball, Inc.", protested the NOD. In the protest, "Place" stated that the taxpayer, a partnership, was never liable for withholding taxes because there were no employees and no wages were paid. Tr. p. 6; Dept. Ex. No. 2.
3. "Joe Doakes", Records Manager, certified that an "IL-W-3, Illinois Annual Withholding Income Tax Return" for 1995, for "Call The Ball, Inc.", signed by "Mary Kay Place" on January 23, 1996, showing withholding tax of \$1,150 was on file with the Department. Tr. p. 6; Dept. Ex. No. 3.
4. "Joe Doakes", Records Manager, certified that no Illinois quarterly withholding tax returns for "Call The Ball, Inc." for March, June, September and December of 1995 were processed by the Department as of March 28, 2000. Tr. p. 6; Dept. Ex. No. 4.
5. Based on the "IL-W-3, Illinois Annual Withholding Income Tax Return" filed for 1995, the Auditor estimated "Call The Ball, Inc.'s" withholding tax liability to be \$1,150. Tr. p. 7; Dept. Ex. No. 6.

6. On February 22, 2000, the Data Operations Center of the Social Security Administration sent a letter to “Mary Kay Place” stating that their records did not indicate any postings for W-2 forms for “Call The Ball, Inc.” for 1995. Tr. pp. 13-14; Taxpayer’s Ex. No. 1.
7. In 1995, “John Doe”, a client of “Mary Kay Place’s” accounting firm, earned wages of \$5000 and had Illinois income tax withheld of \$1,150. The \$1,150 was remitted to the Illinois Department of Revenue by check number 1692, dated January 24, 1996, drawn on “First Chicago Bank.” An “IL-941, Employer’s Quarterly Illinois Withholding Tax Return” for the fourth quarter of 1995 for “John Doe, Inc.” was also remitted. Tr. pp. 14-18; Taxpayer’s Ex. No. 3.
8. “Mary Kay Place’s” work papers for her accounting firm for tax year 1995, prepared in January, 1996, show payroll data for eight clients. The only client with Illinois withholding tax of \$1,150 is “Doe.” The work papers show that IL-W-3’s were filed for eight clients, including “Doe.” “Call The Ball, Inc.” is not listed on the work papers. Tr. pp. 18-19, 23-25; Taxpayer’s Ex. No. 4.
9. Form “IL-1065, Illinois Partnership and Replacement Tax Return,” and Form “1065, U.S. Partnership Return of Income” for “Call The Ball, Inc.” for 1994 are both marked “Final Return.” The “Schedule L Balance Sheet” for “Call The Ball, Inc.”, attached to the federal return, shows year-end “Assets” of zero and “Total Liabilities and Capital” of zero. The tax forms are not signed or dated. Tr. pp. 19-21; Taxpayer’s Ex. No. 5.

CONCLUSIONS OF LAW:

The Department issued the NOD claiming that the taxpayer failed to file withholding tax returns and pay over the taxes deducted from “Call The Ball, Inc.’s” employees’ wages to the State

of Illinois as required under Sections 704 and 705 of the Illinois Income Tax Act. Section 705 states in pertinent part:

Employer's Liability for Withheld Tax:

Every employer who deducts and withholds or is required to deduct and withhold tax under this Act is liable for such tax.

For purposes of assessment and collection, any amount withheld or required to be withheld and paid over to the Department, and any penalties and interest with respect thereto, shall be considered the tax of the employer.
35 ILCS 5/705.

Pursuant to Illinois statute, the NOD is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 ILCS 5/904. In order to overcome this presumption of validity, the taxpayer must produce competent evidence identified with its books and records and showing that the Department's returns are incorrect. Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations. A. R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988).

"Mary Kay Place" operates a payroll and accounting firm for several clients. She was also General Partner and did the accounting for "Call The Ball, Inc.". "Place" maintains that the "IL-W-3, Illinois Annual Withholding Income Tax Return" that is the basis of the NOD was not filed for "Call The Ball, Inc.", but "really applies to "John Doe" whose payroll taxes are paid in full and have been reported on his return correctly." Tr. p. 23.

"Place" testified that she did not have pre-printed "IL-W-3" forms for "John Doe". She maintains that the "IL-W-3" sent in to the Department was a pre-printed form with "Place's" name and address on it but that the form was for another client of the accounting firm. She "whited-out" the other client's name and signed the form and sent it in but failed to write ""John Doe"" on the form. Tr. p. 26.

My contention would be that nothing was filled out except for my name and address and someone did a connection at the [Department] and filled out ... a payroll number. That number there is written at the top in the same handwriting it looks like to me as "Call The Ball, Inc." is written in. So my feeling is that [the Department] looked up in their books what entities are under ["Place"] that weren't filed and I have a "Place" & Associates which is my own and that probably was filed for the year, so they said, it's probably not this one. Here's this other entity she has that's under her name. So it was probably the only other entity that's really under my name and address. All my other people have their own addresses on theirs. Tr. pp. 27-28.

"Place" testified that her signature is on the "IL-W-3" but the words "'Call The Ball, Inc.'" and the FEIN number are not in her handwriting. "Martha Stewart", "Mary's" mother who is a certified public accountant and who worked for "Mary" in 1995 and 1996, testified that "the words "'Call The Ball, Inc.'" are not "Mary's" handwriting." Tr. p. 33. "Mary Kay Place" asked to examine the original "IL-W-3," in order to see if a client's name had been "whited out" and to have a closer look at the handwriting. The Department's litigator did not have the original "IL-W-3" and did not know if he could get the original. Tr. p. 9.

"Place's" contention is corroborated by her and her mother's testimony and documentary evidence. She testified that the withholding of \$1,150 is not a "normal withholding that would be on a \$5,000 wage." Tr. p. 17. "Place's" work papers for 1995, prepared in January, 1996, show payroll data for eight clients. The only client with withholding tax of \$1,150 is "Doe", who had wages of \$5,000 during the year. The work papers contain a notation that an "IL-W-3" was "sent" for "Doe." Taxpayer's Ex. No. 4. A check for \$1,150 payable to the Illinois Department of Revenue was cashed by the Department on January 30, 1996. The check is dated "January 24, 1996." Taxpayer's Ex. No. 3. The "IL-W-3" which is the basis for the NOD is dated January 23, 1996. Dept. Ex. No. 3.

“Place” also testified that “Call The Ball, Inc.” did not have employees in 1995. Tr. p. 10. “Place’s” mother testified that she knew that “Call The Ball, Inc.” did not have employees and did not pay any wages in 1995. Tr. p. 34. The Social Security Administration sent “Place” a letter stating that their records did not indicate any posting of W-2 forms for “Call The Ball, Inc.” for 1995. Taxpayer’s Ex. No. 1. “Call The Ball, Inc.’s” 1994 “IL-1065, Illinois Partnership and Replacement Tax Return” and Form 1065, “U.S. Partnership Return of Income” are marked “Final Return.” Taxpayer’s Ex. No. 5. “Place” testified that “Call The Ball, Inc.” had no employees ever and was not even in existence in 1995.” Tr. p. 15. The “Schedule L Balance Sheet” attached to the federal form shows “end of tax year” “Assets” of zero and “Total Liabilities and Capital” of zero. Taxpayer’s Ex. No. 5.

In the instant case, “Call The Ball, Inc.” presented credible evidence, including the letter from the Social Security Administration, “Place’s” work papers, the cancelled check for \$1,150 remitted for the withholding tax of “John Doe”, and the 1994 tax returns for “Call The Ball, Inc.” marked “Final Return.” The tax returns, which are completed on 1994 forms, are unsigned and undated, and are accorded less weight than the other evidence. Even in discounting the value of the tax returns, I find the evidence submitted by “Call The Ball, Inc.” to be sufficient to rebut the Department’s *prima facie* case, and it is my recommendation that the NOD be cancelled.

Date: August 4, 2000

Kenneth Galvin
Administrative Law Judge